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No. 577

In the Supreme Court of the United States

OCTOBER TERM, 1959

NATHAN W. SHAVIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
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OPINION BELOW

The court of appeals wrote no opinion in dismissing the appeal.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1959 (Pet. 15). The petition for a writ of certiorari was filed on December 9, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the denial of a motion for judgment of acquittal after a mistrial is appealable.

STATEMENT

Petitioner was indicted in the United States District Court for the Northern District of Illinois on a number of counts charging mail fraud. Motions for a judgment of acquittal made at the close of the Government's case and at the end of the case were denied, and six counts were submitted to the jury. The jury failed to agree and was discharged and, pursuant to Rule 29(b) of the Federal Rules of Criminal Procedure, petitioner then renewed his motion for judgment of acquittal. On September 9, 1959, the district court denied the motion, and ordered a new trial (Pet. 4).

Petitioner appealed from the denial of the motion (Pet. 5). The Government moved to dismiss, on the ground that an order denying acquittal is not a reviewable "final decision" under 28 U.S.C. 1291 *(ibid.)*. The court of appeals granted the motion and dismissed the appeal (Pet. 15).

ARGUMENT

The precise issue presented—whether an order denying a motion for judgment of acquittal after the jury has failed to agree is appealable—was decided adversely to petitioner's contention by the Court of Appeals for the Fifth Circuit in *Gilmore* v. *United States*, 264 F. 2d 44, certiorari denied, 359 U.S. 994, and by the Court of Appeals for the District of Columbia Circuit in *Mack and Whiteside* v. *United States*, decided September 29, 1959, certiorari denied, December 7, 1959, No. 507, this Term. The arguments against review that are set forth in the Government's brief in opposition in the latter case (to which we refer the Court) are equally applicable here, and there is no greater reason for further review here than in those two recent cases.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
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DECEMBER 1959.

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NATHAN W. SHAVIN,

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vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR REHEARING

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OCTOBER TERM, 1959.

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NATHAN W. SHAVIN,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Nathan W. Shavin, respectfully prays the Court to grant a rehearing on his petition that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

This cause came to trial on a nine count indictment charging the petitioner with use of the mails for the purpose of executing a scheme to defraud and obtain money by false pretenses and representations from *certain* insurance companies *including* seven named insurance companies.

At the trial the government introduced the testimony of twenty-four witnesses concerning four of the seven

named companies. At the close of its case the government dismissed Counts 1, 5 and 7. Petitioner's motions for judgment of acquittal at the close of the prosecution's case, at the close of all the evidence and after discharge of the jury, without agreeing on a verdict, were all severally denied. It is from the latter order that appeal was taken. Petitioner, upon denial of his final motion for judgment of acquittal moved to dismiss the cause on grounds of former jeopardy and that the indictment as found by the grand jury is no longer extant, having been modified by the prosecutor's alterations on order of the Court, over petitioner's objection. On the 26th day of January, 1960 the motion was overruled and denied.

I.

The alterations spoken of above concerned a lining-out of the ninth paragraph of Count 1, which paragraph alleged a particular mailing. The first eight paragraphs attempted to describe the alleged fraudulent scheme. It was, and is, the petitioner's contention that defacing the Count in any way, or changing its condition as returned by the grand jury rendered it no longer the indictment of the grand jury. The remaining Counts 2, 3, 4, 6, 8 and 9 relied upon attempted incorporation of portions of Count 1, though the words of incorporation are of uncertain meaning and doubtful efficacy. It was, and is, the petitioner's contention that the alteration of the basic count destroyed the indictment and thus the basis for jurisdiction for all Counts. In support of his contention, petitioner relied on *Ex parte Bain*, 121 U.S. 1. On the day this Court denied certiorari herein, it also issued its opinion in *Stirone* v. *United States*, No. 35, October Term 1959, January 11, 1960, reaffirming the principles of *Ex parte Bain*. In *Stirone*, the alteration was effected through the Court's instruction. Here there is actual

physical alteration. The petitioner respectfully prays the Court to examine the indictment before it in the light of the prohibitions explicit in *Ex parte Bain* and *Stirone* v. *United States*.

II.

The theory of merger of the first trial into the second, as advanced by the government in opposition to the petitions in the present circumstance, and similar circumstances, *Gilmore* v. *United States*, 4 Cir., 264 F. 2d 44, cert. den. 359 U.S. 994, *Mack & Whiteside* v. *United States*, C.A.D.C., has been wholly and completely accepted by the trial court as an established rule of law, no doubt engendered by the denials of certiorari. The theory has, indeed, met with such whole-hearted acceptance by the trial court to provoke its statement that the first trial is a "nullity". (Tr. 6, January 28, 1960). We do not believe that the fundamental constitutional proscription against double jeopardy can be frittered away by the proposal of an untried theory, however resourceful or expedient. ". . . no court has gone to the extent of holding that, after the impanelment of the jury for the trial of a criminal case, the failure of the district attorney to have presented sufficient witnesses, or evidence to prove the offense charged, is an exception to the rule that the discharge of a jury after its impanelment for the trial of a criminal case operates as a protection against a retrial of the same case . . ." *Carnero* v. *United States*, 9 Cir., 48 F. 2d 69, 71. Yet the effect of the theory of merger does provide such an exception. It also renders meaningless and unenforceable in the present circumstance the mandate of Rule 29 that the trial court shall enter a judgment of acquittal. We submit this Court should act to dispel further reliance thereon while the theory is yet in embryonic stage.